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Scott v. Hammock : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHELLE SCOTT, Plaintiff/Petitioner, vs. STEVEN LEROY HAMMOCK, Defendant/Respondent, THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, Intervenor.	No. 910112 Priority No. 12

REPLY BRIEF OF PETITIONER

Question of Law Certified from the United States District Court for the District of Utah, Central Division

Honorable David Sam, Judge

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I. THE UTAH STATUTORY CLERGY-PENITENT PRIVILEGE APPLIES ONLY TO PENITENTIAL ACKNOWLEDGEMENTS OF WRONGDOING.

The Brief of Intervenor, The Church of Jesus Christ of Latter-Day Saints ("LDS Church"), goes to great lengths to argue that the word "confession", as it is twice used in Utah Code Ann. § 78-24-8(3), does not really mean confession, but that it means whatever the LDS Church and other religious organizations want it to mean. According to the LDS Church, whether or not a communication is a confession, it must be considered a "confession" within the meaning of Section 78-24-8(3) if the LDS Church determines the communication is confidential. That is not the law and has never been the law. Very simply, if the Utah Legislature wants to expand the clergy-penitent privilege, it has the power to do so; the job is not for the courts to perform.

A. Within the Meaning of Section 78-24-8(3), the Plain Meaning of the Term "Confession" is a Penitential Acknowledgement of Wrongdoing.

The LDS Church would have this Court interpret the word "confession" in Section 78-24-8(3) as encompassing any communications deemed by a religious organization to be "confidential" -- regardless of whether the communications relate to an acknowledgement of wrongdoing.[1] Such lexicological anarchy

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[1] See, e.g., Brief of LDS Church at 14 (the privilege extends "to confidential communications between clergyman and communicant within the doctrine of the church involved.").

Likewise, Magistrate Boyce found that the communications at issue are "non-confessional and non-penitential", Scott v. Hammock, 133 F.R.D. 610, 612 (D. Utah 1990), but that they are nonetheless privileged simply because they are considered "confidential within the doctrines of the LDS Church." Id. at 613.
(continued...)

is wholly insupportable. As much as the LDS Church would like to avoid the fact, the term "confession" in § 78-24-8(3) does have a meaning in the English language.

By blatantly misrepresenting the position of Petitioner Michelle Scott ("Scott"), the LDS Church sets up a huge straw man and commits half its brief to heroically knock it down. The birth of that straw man is found in the following statement:

> The language of the statute, Scott's argument goes, provides only that "confessions" are protected; the term confession "plainly" means that the communicant must be seeking absolution or forgiveness for wrongdoing; and Hammock was not seeking forgiveness when he discussed his conduct with Bishop Brandt. Therefore, according to Scott, Hammock's discussions with Bishop Brandt are not protected under Utah's clergy privilege. See Brief for Petitioner at 12-15.

Brief of LDS Church at 14-15.

The LDS Church does not explain how it arrived at that description of Scott's position, but it is dead wrong. True, Scott vigorously asserts that the clergy-penitent privilege statute provides protection only for confessions; however, Scott has never asserted that the communicant must be seeking absolution or forgiveness in order for a confession to be privileged.[2] The LDS

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[1](...continued)
According to Magistrate Boyce's unique opinion, "it seems appropriate to use the term 'confession' to mean a confidential communication within the doctrine of the church involved." Id. at 619.

[2] The LDS Church represents that "[t]his is the same argument considered and rejected by Magistrate Boyce . . ." Brief of LDS Church at 15. That is simply false. For illustrations of Scott's arguments before Magistrate Boyce, see n.4 infra.

Magistrate Boyce may have confused the matter somewhat when he stated: "The term confession, if narrowly read, would exclude acknowledgements that were made in the course of solicitation of religious counseling and advice." Scott v. Hammock, 133 F.R.D. at 618. Scott has never urged such a narrow reading of the (continued...)

Church cites to pages 12-15 of Scott's Brief in support of its characterization of Scott's argument (Brief of LDS Church at 15), yet the words "forgiveness" or "absolution" do not appear anywhere there -- nor does the argument ascribed to Scott by the LDS Church appear anywhere in any of Scott's written or oral arguments.[3]

Scott's position is -- and always has been[4] -- that (1) a communication must be a "confession" to be privileged under § 78-24-8(3); (2) a confession is simply a penitential admission of wrongdoing; and (3) since Hammock did not confess anything,[5] the privilege does not apply. To be "penitential", a communication need not be made in a quest for forgiveness. Rather, a penitential

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[2](...continued)
term "confession". If an "acknowledgement" is of wrongdoing, Scott has consistently maintained it would be a "confession". Again, see n.4 infra.

[3] Having entirely diverted the course of the argument in this matter to a meandering path of theology and irrelevancy, the LDS Church continues to attack the imaginary argument that seeking forgiveness or absolution is a necessary condition for the invocation of the privilege. See, e.g., Brief of LDS Church at 15, 20 n.11, 21 n.12, 25, 28.

[4] See, e.g., Plaintiff's Memorandum in Response to Motion to Quash Subpoena, Record Document No. ("R") 54, at 3 ("The narrow and plain language of the Utah statute limits the exercise of the priest-penitent privilege to communications by a penitent who has made a confession."); id. at 6 ("Because the priest-penitent privilege is available only if there has been a `confession' and because Hammock has conceded that there was never a `confession', the priest-penitent privilege does not offer any protection against the disclosure . . ."); Transcript of Proceedings Before the Honorable Ronald Boyce, October 18, 1990, R. 97, Ex. "H", at 16 ("There was no communication to which the privilege would attach in this case, very simply because there was no confession being made."); id. at 21 ("[I]f someone knows that they have done something wrong and they seek to make penitence [sic penance], if they seek to confess that sin to an ecclesiastical authority that is when there is the privilege."); Objection to Magistrate's Decision and Order, R. 70 at 22 ("The Utah statute provides a privilege for confessions -- acknowledgements of wrong-doing -- communicated to clergymen, but, there being no record of such a communication in this case, there is simply no privilege that attaches to any of the subject communications.").

[5] Hammock testified three times that his conversations with the bishop were not in the context of confessing anything. Hammock Deposition, pp. 69-71. Nowhere in the record is there any indication that Hammock acknowledged any wrongdoing during his communications with any ecclesiastical authorities. Therefore, there has been no confession and, hence, no privileged communication.

communication is simply an acknowledgement that one has done wrong.[6] In considering narrow clergy-penitent privilege statutes

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[6] The following definitions are useful for the analysis here:

> **Penitent, *a.*** regretting sin or offense and willing to atone; repentant; contrite; doing penance.
>
> **Penitence, penitency, *n.*,** the state of being penitent; regret for offense committed; sorrow, accompanied with the desire to atone.
>
> **Atone, *v.i.*;** to make amends or reparation (for wrongdoing, a wrongdoer, etc.)
>
> **Repent, *v.i.*;** 1. to feel pain, sorrow, or regret for something one has done or left undone; to be conscience-stricken or contrite.... 3. in theology, to feel such sorrow for sin as leads to amendment of one's ways; to be penitent.
>
> **Confess, *v.i.*** 1. to admit or acknowledge one's faults or crimes; own up to one's guilt. 2. in ecclesiastical usage, (a) to tell one's sins in order to receive absolution.
>
> **Confession, *n.*** 1. ...the acknowledgement of anything adverse to one's interest or reputation.... 3. a disclosing of sins or faults to a priest in order to receive absolution.

Webster's New Twentieth Century Dictionary Unabridged (Second Edition).

Scott has no argument whatsoever with any of the definitions above. However, again caught up in its own mischaracterization of Scott's position, the LDS Church asks the following misleading rhetorical question:

> Other than the naked advancement of her own interest, why did Scott adopt the former definition [of "confession" as the disclosing of sins to receive absolution] as the "plain meaning" of the statute, instead of the latter [that "confession" means the acknowledgement of anything adverse to one's interest or reputation]?

Brief of LDS Church at 15. Very simply, Scott has not "adopted" either of the definitions of confession; she agrees that either may be utilized. In fact, she proffered both definitions in her Objection to Magistrate's Decision and Order, R. 70, at 12-13.

In order to resolve any conflict about the definition of "confession", perhaps the best source -- or at least one upon which the parties can all agree -- is the recent book, Repentance, authored by fourteen General Authorities of the LDS Church. (Benson, et al., Repentance, Deseret Book Company 1990). In a chapter entitled "The Meaning of Repentance," Elder Theodore M. Burton provides a useful definition, as follows:

> Confession is an admission of guilt that occurs as repentance begins. (Emphasis in original.)

Repentance, at 11. (See also the identical definition cited in the Brief of LDS Church at 6, attributed to Spencer Kimball, who previously served as President of the LDS Church.)

(continued...)

like § 78-24-8(3), the courts -- with one aberrational exception[7] -

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[6](...continued)
The American Law Institute described "penitential communication" as follows:

> [A] confession of culpable conduct made secretly and in confidence by a penitent to a priest in the course of the discipline or practice of the church or religious denomination or organization of which the penitent is a member.

Model Code of Evidence of the American Law Institute (1942), Rule 219. With an expansion of its applicability beyond "priest" to all clergy, that definition is urged by Scott for utilization in this case.

[7] After recklessly mischaracterizing Scott's position in this matter, see pp. 2-3, 4 n.6, supra, the LDS Church finds it appropriate to label as "outrageous" Scott's statement in her initial brief that "all [jurisdictions with similar statutes] have held that the privilege applies only if the communication was penitential in nature." Brief of LDS Church at 27-28. The LDS Church then continues with the following fabrication:

> This statement is wholly misleading and completely incorrect; indeed, several courts have interpreted statutes virtually identical to Utah's in a much broader fashion than Scott would like to admit.

Brief of LDS Church at 28 (emphasis added).

Scott concedes that her counsel's initial research did not ferret out one case, Kruglikov v. Kruglikov, 29 Misc. 2d 17, 217 N.Y.S.2d 845 (Sup.Ct. 1961), appeal dismissed, 16 A.D.2d 735, 226 N.Y.S.2d 931 (1962), a decision of one judge -- the trial court -- in New York, in which it was held that New York's clergy-penitent privilege statute (which is substantially identical to Utah's) provides a privilege for "confidential communications" because they "must be deemed to fall within the spirit of this statute." 217 N.Y.S.2d at 847.

According to the LDS Church, Kruglikov -- a trial judge's unreasoned opinion that flies in the face of all other cases considering narrow privilege statutes like Utah's -- is "[t]he leading case on this issue." Brief of LDS Church at 28. However, after reviewing the case law and the various law review articles discussing Kruglikov (articles relied upon by the LDS Church), one is compelled to ask, "Whom has Kruglikov led?" The fact is, no court construing a narrow privilege statute like Utah Code Ann. § 78-24-8(3) has followed Kruglikov. Further, the commentators have been less than kind to Kruglikov. See, e.g., Mitchell, Must Clergy Tell? Child Abuse Reporting Requirements Versus The Clergy Privilege And Free Exercise of Religion, 71 Minn.L.Rev. 723 (1987) ("Mitchell"), at 750 n. 156 (marital counseling at issue in Kruglikov does not seem to qualify for privilege because, inter alia, it is "not necessarily penitential."). Kuhlman, Communications to Clergy--When Are They Privileged?, 2 Val.U.L.Rev. 265, 272 (1968) ("Kuhlman"), which is relied upon by the LDS Church, roundly criticizes Kruglikov, as follows:

> The court [in Kruglikov], without bothering to support its decision with citations of authority or any reasoning, simply held that what was said by the parties in the rabbi's study was stamped "with that seal of confidence which the parties in such a situation would feel no occasion to exact."

(continued...)

- have universally held that only confessions are privileged. Those cases are divided, but only on the issue of whether a confession must be mandatory in order for it to be privileged. See, e.g., Kuhlman, supra, at 270-272.

For instance, in In Re Swenson, 183 Minn. 602, 237 N.W. 589 (1931), a case mystifyingly relied upon by the LDS Church, the court read the privilege statute (which was essentially identical to Utah's statute) as applying to voluntary and mandatory confessions alike.[8] In that case, so warmly embraced by the LDS Church, the court answered the question certified to this Court, making it abundantly clear that a communication "must . . . be

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[7](...continued)
Having falsely asserted that "several courts" have gone Kruglikov's way (Brief of LDS Church at 28), the LDS Church cites to only one other case, People v. Pecora, 107 Ill.App. 2d 283, 246 N.E.2d 865 (1969). The LDS Church represents that in Pecora the court construed "a statute very similar to Utah's" and excluded a pastor's testimony regarding communications in the course of marriage counseling. However, the truth is that the statute at issue in Pecora was a far cry from Utah's statute, protecting against disclosure of "any information which has been obtained by [a clergyman] in such professional character or as such spiritual advisor." If the statute under consideration in Pecora had been enacted in Utah, the question certified to this Court would never have arisen.

[8] The privilege statute at issue in In Re Swenson provided as follows:

> A clergyman or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs.

237 N.W. at 590.

The Court read the last clause of the statute as meaning that "it is sufficient whether such 'discipline' enjoins the clergyman to receive the communication or whether it enjoins the other party . . . to deliver the communication." 237 N.W. at 591. The narrower approach was taken by Chief Justice Larson in Clawson v. Walgreen Drug Co., 162 P.2d 759, 769-70 (Utah 1945) (C.J. Larson, concurring) ("The clergical relation bars only information obtained in confessions (communications) and then only where such confessions are enjoined upon the confessor by course of church practice or discipline.").

penitential in character" for the privilege to apply. 237 N.W. at 591. The court described the coverage of the statute as follows:

> [T]he "confession" contemplated by the statute has reference to a penitential acknowledgement to a clergyman of actual or supposed wrongdoing while seeking religious or spiritual advice, aid, or comfort, and that it applies to a voluntary "confession" as well as one made under a mandate of the church.

237 N.W. at 590 (emphasis added).

Nothing in Swenson could possibly lead one to the conclusion, urged by the LDS Church and as stated in Magistrate Boyce's opinion, that the term "confession" has such a broad meaning as to encompass all "confidential communication[s] within the doctrine of the church involved." Scott v. Hammock, 133 F.R.D. at 619. Rather, as stated in Swenson, and every other case (except one[9]) interpreting narrow privilege statutes similar or identical to § 78-24-8(3), only penitential acknowledgements of wrongdoing are privileged.[10]

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[9] See pp. 5-6 n.7, supra.

[10] See, Brief of Petitioner at 21-23. See also Cimijotti v. Paulsen, 219 F.Supp. 621, 624 (N.D. Iowa 1963) (construing statute far broader than Utah's, held that "the statements [must] be penitential in character and made by the penitent"); In Re Estate of Soeder, 7 Ohio App.2d 271, 220 N.E.2d 547, 568 (1966) (Ohio's statute, nearly identical to Utah's, "is based on sound policy . . . which concedes to religious liberty a rule of evidence that a clergyman shall not disclose . . . the secrets of a penitent's confidential communication to him."); Kuhlman, supra, at 268 ("For a communication to be privileged under [the 'traditional statute', such as Utah's . . . [t]he communication must be a 'confession'."); Mitchell, supra, at 740 ("Colorado's [statute, virtually identical to Utah's] is brief and narrow and limits the privilege . . . to confessions."); Stoyles, The Dilemma Of The Constitutionality Of The Priest-Penitent Privilege -- The Application Of The Religion Clauses, 29 U.Pitt.L.Rev. 27, 35 (1967) ("[I]n the typical statute [like Utah's] . . . the communication must be a 'confession'", and under such statutes, "[s]tate courts have often found that a communication was not of a confessory nature and therefore was not protected by the privilege.").

B. The Clergy-Penitent Privilege Statute Must Be Interpreted According to its Terms, Not According to What Various Religious Organizations or the Courts Believe Should be Confidential.

The Utah Legislature enacted § 78-24-8(3) by twice utilizing the term "confession." Citing Magistrate Boyce's opinion, the LDS Church argues that "the statute's [sic] 'stress on "confession" is at the dilution of the language "in the course of the discipline enjoined by the church to which he belongs."'" Brief of LDS Church at 18. However, the LDS Church and Magistrate Boyce would simply delete the term "confession" and substitute in its place the phrase "communication deemed by the church to be confidential." That sort of judicial tampering with a statute cannot be sanctioned.

This Court has long recognized that statutory interpretation "must be based on the language used, and that the court has no power to rewrite a statute to make it conform to an intention not expressed." Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n, 107 Utah 502, 505, 155 P.2d 184, 185 (1945). As a corollary, this Court presumes the legislature has used the terms of a statute advisedly, and that courts should interpret those terms in accord with their usually accepted meanings. See Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983).

Apparently because of a "trend" toward a broader application of the clergy-penitent privilege in the federal common law, Scott v. Hammock, 133 F.R.D. at 615-16, and because of his surmises about religious doctrines and what the Utah territorial legislature

intended, id. at 618, Magistrate Boyce attributed a meaning to "confession" far beyond that ever used in the English language.

The federal common law is without any value in interpreting Utah's statute. Rule 501, Federal Rules of Evidence. Further, the "legislative history" of § 78-24-8(3) described in Magistrate Boyce's opinion -- and so enthusiastically embraced by the LDS Church -- is not legislative history at all; it is merely guesswork, based in part on a misunderstanding of LDS Church doctrine. There is no need at all to resort to legislative history, even if it could be ascertained. Where, as in this case, the statutory language is not vague or ambiguous, the courts must assume that the legislature meant what it said and apply the plain meaning of the statute instead of trying to divine "legislative intent."[11] That principle is essential if the rule of law, rather than the imposition of the particular views of individual judges, is to prevail. The decision of Magistrate Boyce and the position of the LDS Church here violates that rule, supplanting the guesses as to the intentions of the Utah territorial legislature for the plain expression of the law in the statute.

In addition to adhering to the plain meaning rule, the courts are to construe and apply privilege statutes strictly because they have the effect of "clos[ing] another window to the light of

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[11] Brinkerhoff v. Forsyth, 779 P.2d 685, 686 (Utah 1989); Allisen v. American Legion Post #134, 763 P.2d 806, 809 (Utah 1988); P.I.E. Emp. Federal Credit Union v. Bass, 759 P.2d 1144, 1151 (Utah 1988); Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984); Matheson v. Crockett, 577 P.2d 948, 949 (Utah 1978).

truth." State v. Gotfrey, 598 P.2d 1325, 1327-28 (Utah 1979).[12] Nothing contradictory to the rule of strict construction is found in any of the cases cited by the LDS Church.

Section 78-24-8(3) does not refer to "counseling" or other types of communications broader than "confessions". To hold that the term "confession" means something more than "confession" is not simply to torture the word; it would amount to judicial alteration of the English language. Officials of the LDS Church once sought to alter completely the English alphabet, see Weller & Reid, "The Deseret Alphabet," True West, at 14-16 (Sept.-Oct. 1958); now its lawyers seek to change the meaning of common English words.[13]

Section 78-24-8(3) may be "poorly drafted," Yellin, The History and Current Status of the Clergy-Penitent Privilege, 23 Santa Clara L.Rev. 95, 107 (1983) ("Yellin"), and "archaic", Kuhlman, supra, at 272, but it says what it says until the legislature changes it. The job of improving the statute is not

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[12] See also Gold Standard v. American Barrick Res., 801 P.2d 909, 911 (Utah 1990) (the attorney-client "privilege should be `strictly construed in accordance with its object.' "), quoting Jackson v. Kennecott Copper Corp., 27 Utah 2d 310, 495 P.2d 1254, 1257 (1972); 81 Am.Jur.2d Witnesses § 141 at 183 ("[B]ecause the assertion of a statutory privilege is usually an inhibiting limitation upon the discovery of truth, such privileges are in derogation of the common law and should be strictly construed.").

[13] Contrary to the position of the LDS Church here, an LDS Church stake president had no problem with the term "confession" in State v. Cox, 742 P.2d 694, 696 (Or. App. 1986), where an admission by a step-father of sexual intercourse with his daughter was at issue. In Cox, the court reviewed the stake president's testimony as follows:

> He testified at a pretrial hearing that stake presidents are accustomed to hearing "confessions":
>
> > "On the local level there are four individuals who I guess you say serve as confessors in that comparison to the Catholic Church. And that is the bishop and the three members of the stake presidency. I'm one of those members."

for the courts to perform. "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." Badaraco v. Commissioner, 464 U.S. 386, 398 (1984).[14]

II. COMPELLED DISCLOSURE OF HAMMOCK'S NON-CONFESSIONAL COMMUNICATIONS WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES OR UTAH CONSTITUTIONS.

A. The Establishment Clause is Not Implicated Simply by Reason of the Fact That a Statute Might Affect Different Religious Organizations Differently.

The LDS Church claims that a privilege covering only some communications considered to be "confidential" by certain religions is violative of "Establishment Provisions" of the Utah Constitution. This peculiar argument is summed up as follows:

> Plainly, a statute that protects the confidential communications of only one or a few religions, but not the confidential communications of other religions, tends to favor and advance the former while imposing a disadvantage on the latter.

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[14] See also Simrin v. Simrin, 233 Cal.App.2d 90, 43 Cal.Rptr. 376 (1965) where, under a narrow statute similar to Utah's, communications with a rabbi during marriage counseling were held not to be privileged. The court in Simrin took a principled approach, stating as follows:

> [The statute] is limited to confessions. . . . It would wrench the language of the statute to hold that it applies to communications made to a religious or spiritual advisor acting as a marriage counselor. We think this result regrettable for reasons of public policy. . . , but the wording of the statute leaves us no choice.

43 Cal.Rptr. at 379 (emphasis added). No less principled approach should be taken in the application of Utah's clergy-penitent privilege statute in this case. See e.g., State v. Gotfrey, 598 P.2d 1325, 1328 (Utah 1979) ("It is neither our duty nor prerogative to pass upon the wisdom of [a privilege statute]."); Gord v. Salt Lake City, 434 P.2d 449, 451 (Utah 1967) (A statute "should not be . . . applied other than in accordance with its literal wording unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right" and, "[i]f it meets these tests it is not the court's prerogative to consider its wisdom, or its effectiveness . . .").

Brief of LDS Church at 40.[15]

There can be little wonder why such a "plain" proposition is stated without the citation of any authority; it is not only not "plain" -- it is contrary to law and reason. In sum, the LDS Church is saying that since confession plays a role in the Catholic and LDS Churches, but it has no place in some other religions, to allow a privilege for confessions, without allowing a privilege for all other communications considered by certain religions to be confidential, would be unconstitutional.[16] To require absolute equality of the effects legislation may have on various religions is a fine ideal; however, in the real world, it is impossible.

Suppose the existence of a religious organization (the Marxarians) that is doctrinally opposed to the ownership of private property. Would tax exemptions be unconstitutional because the Marxarians could not take advantage of them while other churches did? To reach such an absurd conclusion, the Marxarians might parrot the LDS argument, asserting that "plainly, a statute that results in tax advantages for some religions, but not for others, tends to favor and advance the former while imposing a disadvantage on the latter." However, different effects do not pose the

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[15] For another statement of the LDS Church's argument, see p. 14 n.19, infra.

[16] The position of the LDS Church is certainly not aided with an assertion that the application of the clergy-penitent privilege statute, according to its plain terms, is unconstitutional. If that were the case, not only would Hammock's non-confessional and non-penitential communications be subject to compelled disclosure, but even confessions of wrongdoing would be unprotected. Contrary to the position the LDS Church seems to be taking here, to say that a statute is unconstitutional is not to say that the statute can be rehabilitated by expanding it far beyond its terms.

constitutional problems imagined by the LDS Church. See Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 719-20 (1981) (to compel payment of unemployment benefits for member of Jehovah's Witnesses under circumstances where others would not receive benefits is not unconstitutional); Sherbert v. Verner, 374 U.S. 398, 409 (1963) (requiring states to grant unemployment benefits to a Seventh-Day Adventist who refused to work on Saturdays would not violate the Establishment Clause).[17]

Suppose that a religion (The Church of the Last Confession) adhered to a "divinely inspired" doctrine requiring all members (referred to as Confessionaires) to share with the entire congregation in confessional meetings their deepest and darkest secrets. Suppose also that the church held each Confessionaire to the strictest confidence regarding the barings of souls during confessional meetings, teaching that one will be damned if he or she discloses to any outsiders what is heard.[18] Finally, suppose that the Utah Legislature finally amended the clergy-penitent

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[17] One commentator has noted that even if a privilege statute applied only to Catholics, there would be no legitimate Establishment Clause challenge, stating as follows:

> Recognition of a testimonial privilege for only Catholic clergy and penitents, based on a distinction between mandatory confession in the Catholic Church and the spiritual guidance provided by the clergy of other religions, would, however, be supportable. Because the Supreme Court has held that treating different religions differently does not necessarily offend the Establishment Clause, recognizing the privilege for the Catholic clergy would not require recognition for all clergy.

Developments in the Law -- Privileged Communications: I.V. Medical and Counseling Privileges, 98 Harv. L. Rev. 1530, 1560-61 (1985) ("Developments").

[18] Posing an even more extreme situation is the religious doctrine of Islam, which prohibits one Moslem from testifying against another. See, e.g., State v. Bing, 272 S.C. 544, 253 S.E.2d 101, 102 (1979).

privilege statute to protect from disclosure "all communications made to a priest or clergyperson during the course of counseling or religious activities." Assuming only a few Confessionaires would be considered clergypersons, would the new, expanded privilege statute be violative of the Establishment Clause because it did not provide a privilege for each member of the church? Of course, the Church of the Last Confession would borrow the argument of the LDS Church here,[19] contending that since all of the communications considered to be confidential by the LDS Church are now protected, all of the communications considered to be confidential by the Church of the Last Confession likewise must be protected. Therefore, following the logic of the LDS Church in this case, the plain terms "priest or clergyperson" in the statute must be disregarded and the statute must be interpreted as protecting from disclosure by any Confessionaire the acknowledgements of wrongdoing by other members. In other words, the term "clergyperson" must now be read as meaning "anyone", at least as applied to Confessionaires. That is how far the argument of the LDS Church in this case would require the courts to go in stretching common English words beyond recognition to fit its Procrustean beds of religious doctrine.

The LDS Church ignores the fact that legitimate statutes, neutral on their face and in intent, almost certainly will affect

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[19] "Only by applying the privilege equally to the confidential communications of all religions can the law survive establishment clause scrutiny." Brief of LDS Church at 42.

different religions differently. In fact, it would be impossible to create a legal code that would place everyone or every religion on an equal ground, affecting each one equally. The provision of a testimonial privilege that applies to different religions differently is hardly the sort of "sponsorship, financial support [or] active involvement of the sovereign in religious activity" that was sought to be prevented by the men who wrote the Religion Clauses of the First Amendment. Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

B. The Practice of Requiring the Disclosure of Communications Not Protected by the Terms of a Privilege Statute, Regardless of Whether Such Communications are Considered by a Religion to be "Confidential", is Firmly Established.

After the reformation, English law abandoned the clergy-penitent privilege. See, e.g., Developments, supra, at 1555; Yellin, supra, at 101.[20] Since this nation's beginning, with one aberrational exception (People v. Phillips, discussed below), the privilege has not been recognized under state law in the absence of a statute. See, e.g., Kuhlman, supra, at 267.[21] During 1813, an opinion, not officially reported,[22] was rendered by a New York

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[20] Presently, there is no clergy-penitent privilege in England, even as to confessions made to a minister. II Halsbury's Laws of England, ¶ 464 (4th Ed. 1973).

[21] The following are illustrative of cases holding that communications not protected from disclosure by statute must be disclosed, notwithstanding that they are considered "confidential" by a religious organization: In Re Williams, 269 N.C. 68, 152 S.E.2d 317 (1967); Keenan v. Gigante, 417 N.Y.S.2d 226, 230 (Ct.App.N.Y. 1979) ("[W]e reject [minister's] contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute."); Commonwealth v. L.D.B., 295 Pa.Super. 1, 440 A.2d 1192 (1982).

[22] Yellin, supra, at 104 n.49.

trial court, holding that to force a priest to testify concerning secret confessions would violate the free exercise of religion. People v. Phillips, an "editor's report" of which is abstracted in 1 W.L.J. 109 (1843). See Yellin, supra, at 105. However, Phillips does not have a following; the "prevailing opinion [is] that the clergy privilege rests only on statute." Mitchell, supra, at 799. See generally Branzburg v. Hayes, 408 U.S. 665, 689-90 (1972) ("Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination.")

The consistent history of restricting the clergy-penitent privilege to the confines of privilege statutes is itself a strong indication of the constitutionality of such a restriction. The United States Supreme Court, considering another Establishment Clause challenge, expressed the significance of the history of a practice as follows:

> [A]n unbroken practice of according the [tax] exemption to churches . . . is not something to be lightly cast aside. Nearly 50 years ago Mr. Justice Holmes stated:
>
> "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . ." Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 67 L.Ed. 107, 112, 43 S.Ct. 9 (1922).

Walz v. Tax Commission, 397 U.S. 664, 706-07 (1970). See also Justice Brennan's concurrence in Walz, 397 U.S. at 681 (J. Brennan concurring).

To hold now, under either the federal or state constitutions, that the limitation of the privilege, according to the terms of

§ 78-24-8(3), would constitute a violation of any of the Religious Clauses would be an unjustified deviation from the practice and the law throughout this country for more than two centuries.

III. COMPELLED DISCLOSURE OF HAMMOCK'S NON-CONFESSIONAL COMMUNICATIONS WOULD NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE UNITED STATES OR UTAH CONSTITUTIONS.

Somehow, the LDS Church seeks to find somewhere in Utah's free exercise provisions[23] a privilege against the compelled disclosure of whatever communications a religious organization thinks should be confidential. No such unrestricted license can be found -- nor do the authorities cited by the LDS Church support such a constitutionally mandated privilege.

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[23] The Utah Constitution contains the following Free Exercise provisions:

> All men have the inherent and inalienable right . . . to worship according to the dictates of their consciences; . . . (article I, section 1).
>
> The rights of conscience shall never be infringed. (article I, section 1).
>
> Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited. (article III, first ordinance).

The LDS Church has deceptively characterized the free exercise provision of article I, section 1 as follows:

> To review those specific and detailed [free exercise] provisions, Article I, Section 1 guarantees all Utah citizens "the inherent and inalienable right . . . to worship according to the dictates of their consciences [and] to communicate freely their thoughts and opinions."

Brief of LDS Church at 44 (emphasis in Brief of LDS Church). In fact, the clause emphasized by the LDS Church is actually the "freedom of speech" clause and is not connected in any way to the "free exercise" clause. Inserted between those two clauses in article I, section 1 is the "freedom of assembly" clause, yet the LDS Church failed even to indicate the omission by ellipses. For good reason, no court has ever even remotely indicated that the constitutional freedom of speech entails a testimonial privilege.

A. The Free Exercise Provisions Do Not Create A Testimonial Privilege.

The LDS Church makes some tremendous leaps in reason and interpretation when it asserts that the "exercise of religion" necessarily entails a privilege as broad as church doctrine desires. It goes completely off the deep end when it argues, without any supporting authority, that the right of free speech guaranteed by the Utah Constitution requires protection from compelled disclosure, Brief of LDS Church at 46, and that " `[p]erfect toleration of religious sentiment' can mean nothing less than complete confidentiality of private feelings and communications." Id.[24]

The argument of the LDS Church under the Free Exercise provisions is no longer an argument about the statutory privilege;

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[24] Although the several provisions in the Utah Constitution are far more prolix than the religious clauses of the First Amendment to the United States Constitution, there is no legal or textual authority for the assertion that the Utah Constitution affords greater free exercise protection than the First Amendment. See, e.g., In Re Williams, 152 S.E.2d at 325 (state constitutional provision protecting "rights of conscience" is no more extensive than the freedom to exercise one's religion, which is protected by the First Amendment to the Constitution of the United States."); State v. DeLaBruere, 577 A.2d 254, 270 (Vt. 1990) (surveying several states with free exercise constitutional provisions substantially similar to Utah's in which "courts have either held that their constitutional provision offers the same level of protection to the free exercise of religion as the First Amendment or have decided free exercise cases involving their constitutional provision solely on federal precedents.").

Further, because of the tremendous complexities involved in "the struggle to find a neutral course between the two Religion Clauses," L. Tribe, American Constitutional Law at 815 n.89, this Court should be very wary indeed of setting out to chart a new course in this incredibly difficult area of constitutional jurisprudence. For a state supreme court to expand constitutional protections beyond those mandated by the United States Supreme Court is often a most salutary objective (especially nowadays), but this Court should follow the lead of the United States Supreme Court in the area of freedom of religion. For an excellent illustration of the complex tensions between the Establishment and Free Exercise Clauses, and the fine-tuning necessary to accommodate both, see Walz v. Tax Commission, 397 U.S. at 668-69; 674-75. To provide the greater "free exercise" protection sought by the LDS church would likely be to infringe on the interests sought to be protected by the Establishment Clause. Id.

rather, it argues that a privilege -- even absent a statute -- is constitutionally mandated. Only once, in a unique, unreported 1813 decision of a trial court, People v. Phillips, supra, has that argument persuaded anyone.[25] Kuhlman, supra, at 267.

If the constitutional right claimed by the LDS Church exists for the clergy, it must also exist for the laity. The same religious duty not to disclose communications is imposed on all the hypothetical Confessionaires, see pp. 13-14, supra, and Muslims, see State v. Bing, supra, as on LDS bishops; therefore, according to the LDS Church's argument, the effects of constitutional protection must be the same for all members of certain religions as for the clergy in others. If that were true, the courts would often be deprived of potential relevant evidence and constantly engaged in assessing the genuineness of asserted beliefs in a

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[25] Although the LDS Church maintains that "[o]ther cases and authorities have recognized a constitutional free exercise basis for the clergy privilege," Brief of LDS Church at 46, the only case cited that actually supports that position is Phillips. The other cases cited are far off point:

> Mullen v. United States, 263 F.2d 275 (D.C.Cir. 1958), simply describes the applicable rule of evidence relating to the privilege when a "penitent" has made a "confidential communication." Id. at 280.
>
> Cimijotti v. Paulsen, 230 F.Supp. 39 (D. Iowa 1964), aff'd., 340 F.2d 618 (8th Cir. 1965) (per curiam), did not deal with a privilege at all; it merely held that a person has a first amendment right to freely speak with officials of a church without the threat of a slander suit, and noted specifically that "[t]his does not mean that in some instances [the communication] may not have to be disclosed." Id. at 41.
>
> Griffin v. Coughlin, 743 F.Supp. 1006 (D.N.Y. 1990), also does not deal with a testimonial privilege; it merely holds that an inmate has a "free exercise" right to privately communicate with his "spiritual advisor".

religious duty to keep mum. No constitution permits such a result.[26]

Although the compelling interests of the state in "the rendering of a just judgment" and "the effective operation of a court of justice", see n.26, supra, are at stake in this case, there need be no showing of such an interest because Rule 45, Utah Rules of Civil Procedure, and the other rules relating to discovery and evidence, are neutral with respect to religion, religious

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[26] The point was well stated by the North Carolina Supreme Court as follows:

> The freedoms protected by these constitutional [free exercise] provisions are not limited to clergymen. Indeed, they are not limited to members of an organized religious body, and consequently, are not contingent upon proof that others share the views of the individual who asserts his own constitutional right to the freedom to exercise his religion or "right of conscience." Thus, if a clergyman, not otherwise privileged to refuse to testify, is protected from compulsion to do so by these constitutional provisions, because he believes that for him to so testify would violate his religious duty, a layman having such belief would also be protected from compulsion to testify. The constitutional provisions extend their protection to the unorthodox, unusual and unreasonable belief as truly as to the belief shared by many. Thus, a holding that these constitutional provisions grant to the clergymen a privilege against compulsion to disclose upon the witness stand information given him in confidence because such disclosure would violate the clergyman's concept of religious duty, may well give rise to claims of a like privilege by laymen. The consequence might well be to deprive the courts of testimony necessary in order to administer justice, or to require them to embark upon the hazardous undertaking of determining the sincerity of the belief asserted.

In Re Williams, 152 S.E.2d at 325 (emphasis added). In Williams, the court concluded that "[t]he `compelling interest' of the state in the rendering of a just judgment in accordance with its law overrides the incidental infringement upon the religious belief of the witness that for him to testify is wrong." Id. at 327. Likewise, in affirming a trial court's contempt order and six month jail sentence for a Moslem who refused to testify against a fellow Moslem because of his religious beliefs, the South Carolina Supreme Court held that "the effective operation of a court of justice is a compelling state interest." State v. Bing, 253 S.E.2d at 102. See generally West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (J. Murphy, concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society, -- as in the case of compulsion to give evidence in court.").

organizations, or any other person or entity from whom evidence is sought.[27]

IV. THE FLUID STANDARD FOR DEFINING THE TERM "CONFESSION", AS ADVOCATED BY THE LDS CHURCH, WOULD BE VIOLATIVE OF THE UNITED STATES AND UTAH CONSTITUTIONS.

Not only does the Utah clergy-penitent privilege statute pass constitutional muster; the analysis advocated by the LDS Church would be clearly violative of both the United States and Utah Constitutions.

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[27]

> [T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."
>
> * * *
>
> To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" -- permitting him, by virtue of his beliefs, "to become a law unto himself," Reynolds v. United States, 98 U.S., at 167, 67 L.Ed.2d 624 101 S.Ct. 1425 -- contradicts both constitutional tradition and common sense.
>
> * * *
>
> Our conclusion that generally applicable religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents [Washington v. Davis, 426 U.S. 229 (1976) and Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969)].

Employment Division v. Smith, 108 L.Ed.2d at 886, 890, 891 n.3, 110 S.Ct. at 1600, 1603, 1604 n.3 (some citations omitted).

According to the Court in Smith, which rejected the Free Exercise claims of two men who were denied unemployment benefits after being fired from their jobs for partaking of peyote pursuant to their religious doctrine, the requirement of a compelling state interest is properly restricted only (1) to laws that expressly mandate or prohibit religious beliefs or religiously based conduct; or (2) to "hybrid" cases alleging violations of the free exercise clause and another constitutional right, such as freedom of speech or of the press. Smith, 110 S.Ct. at 1599, 1601, 108 L.Ed.2d 884-85, 887-88.

A. The Doctrine-Dictated Reading of the Term "Confession" Proposed by the LDS Church Would Be Violative of Article I Section 4 of the Utah Constitution.

The LDS Church asserts that the meaning of "confession" in § 78-24-8(3) must change like a chameleon, depending on the religious doctrine involved in each case, stating as follows:

> Section § [sic] 78-24-8(3) requires that the term "confession" be interpreted, not under a cramped "plain meaning" standard, but according to the doctrines and beliefs of the particular church involved.

Brief of LDS Church at 12.

The Utah Constitution expressly proscribes that sort of treatment of religious belief as a criterion for determining whether a witness can testify. Article I, section 4 provides, in relevant part, as follows:

> [N]or shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof.

Clearly, the LDS Church's position that the testimonial privilege should apply to any communications that are considered "confidential" according to "the doctrines and beliefs of the particular church involved" is contrary to that constitutional prohibition.[28]

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[28] Article I, section 4 refers to "incompetence" of a witness. The clergy-penitent privilege renders a clergyperson "incompetent as a witness." See, e.g., Angleton v. Angleton, 370 P.2d 788, 797 (Idaho 1962) (priest "incompetent" to testify by reason of privilege statute); Knight v. Lee, 80 Ind. 201, 203 (1881) (privilege statute rendered clergyman "incompetent" to testify); State v. Kurtz, 564 S.W.2d 856, 860 (Mo. 1978).

B. The Courts are Constitutionally Restrained From Inquiring About the Doctrines or Beliefs of Religions in Order to Determine Whether a Communication is "Confessional".

The LDS Church seeks to have the courts inquire in every instance about the "doctrines and beliefs of the particular church involved" in order to ascertain whether, within the religion, the communication at issue is "confidential." Such an inquiry is constitutionally forbidden.

Excessive governmental entanglement with religion is forbidden under the Establishment Clause of the United States Constitution, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), yet that is exactly what will result if the LDS Church has its way. The courts cannot be placed in the position of determining church doctrine or the importance of certain beliefs within a religion. For instance, Oscar W. McConkie testified that "bishops and stake presidents are instructed to keep strictly confidential matters brought to them in confidence" and that such confidentiality is "the policy of the church." (Depo. of Oscar W. McConkie at p. 42, l. 1-4.) Yet he conceded that there have been exceptions to that confidentiality where state law requires the reporting of sexual abuse. Id., p. 40, l. 14-25. See also Church of Jesus Christ v. Superior Court, 764 P.2d 759, 761 (Ariz. App. 1988) (LDS stake president reported sexual abuse of communicant the day after communicant was excommunicated). How absolute is the doctrine of confidentiality and what are the parameters of any exceptions thereto? The courts simply cannot involve themselves in mapping out the often-disputed and unclear terrain of such "doctrine and beliefs."

> There exists an overriding interest in keeping the government -- whether it be the legislature or the courts -- out of the business of evaluating the relative merits of differing religious claims.

Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 16 (1989).

The LDS Church maintains that the communications in this case were "confidential" within the doctrine of the religion. Scott disputes that, stressing that Hammock no longer wanted to be a member of the LDS Church at the time of the communications, he did not "confess" anything, and the LDS Church permits the disclosure of communications concerning child sexual abuse under certain circumstances.[29] Whatever the extent of the doctrinal confidentiality and exceptions thereto, the courts are the wrong forum to determine the issues.

> "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds." Hernandez v. Commissioner, 490 U.S. at _____, 104 L.Ed.2d 766, 109 S.Ct. 2136. Repeatedly and

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[29] Of course, the parties do not expect this factual issue to be determined on appeal. However, it is instructive to consider how Magistrate Boyce came to his conclusions about LDS Church doctrine. Magistrate Boyce stated as follows:

> There is no question the communication in this case was made to the LDS Church bishop `in the course of the discipline' of the LDS Church. This has been represented as being the case by the church counsel and no contrary evidence is presented.

Scott v. Hammock, 133 F.R.D. at 613.

It is true that such representations were made by church counsel, but it is also true that such representations were made without any foundation and without any personal knowledge by church counsel. Compare the statements made by church counsel during a hearing before Magistrate Boyce with his later deposition testimony, set forth in Appendix "A" hereto. That comparison lends support for the principle that courts should rely solely on the evidentiary record, not on the jaw-boning of counsel. See State v. Arroyo, 796 P.2d 684, 687 (Utah 1990), quoting Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1017 (Fla. Dist. Ct. App. 1982) ("Trial judges cannot rely upon these unsworn statements [of attorneys] as the basis for making factual determinations. . . ."). It also points out some of the pitfalls in calling upon the courts to establish what is and is not a matter of church doctrine.

> in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

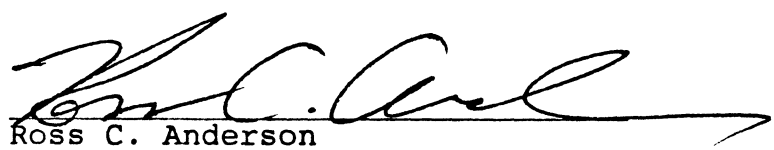
Employment Division v. Smith, 110 S.Ct. at 1604, 108 L.Ed.2d at 891 (citations omitted). See also Lanner v. Wimmer, 662 F.2d 1349, 1361 (10th Cir. 1981).

CONCLUSION

For the reasons set forth above, Scott respectfully urges this Court to answer the certified question by ruling that the term "confession" in § 78-24-8(3) is limited to penitential acknowledgements of wrongdoing and that the Utah clergy-penitent privilege statute, as it is now written, does not extend to every communication designated by any religion as "confidential".

Dated this 27th day of September, 1991.

ANDERSON & WATKINS



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CERTIFICATE OF SERVICE

On this 27th day of September, 1991, I hereby certify that I caused to be hand-delivered four true and accurate copies of the foregoing **Reply Brief of Petitioner** to the following:

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APPENDIX A

Proceedings Before Magistrate Boyce, October 18, 1990 (R. 97, Ex. "H")	Deposition of Oscar W. McConkie, February 28, 1991
The Court: But those statements from the defendant in this case [made to the stake president] were the underpinnings of the conclusion [of the ecclesiastical disciplinary council]?	Mr. Anderson: Is it true that at the time of this hearing [before Magistrate Boyce] you had no knowledge as to whether any of the statements of Steven LeRoy Hammock to his bishop or stake president or anybody else in the L.D.S. Church constituted the underpinnings or constituted any factor in the conclusion reached by the disciplinary counsel?
Mr. McConkie: That is right. Transcript, p. 9, l. 16-18.	Mr. McConkie: Yes. McConkie Depo., p. 29, l. 8-15.
* * * * *	* * * * *
The Court: [T]ell me from the doctrinal standpoint of the LDS Church what the activity was that the defendant was engaging in in seeking the communication with the bishop, that is, was it within the legitimate ecclesiastical functions of the church?. . . [I]s there an ecclesiastical foundation for that communication?	Mr. Anderson: [W]hen you answered yes on line 15 of page 12 of the transcript of the October 18th proceedings before Magistrate Boyce, is it true that you were referring generally to communications where there's spiritual counseling being sought, rather than specifically with regard to the communications by Mr. Hammock with his bishop?
Mr. McConkie: Yes. Transcript, p. 12, l. 8-15.	A. My reference was to the general concept of the way in which it operates.
	Q. [Y]ou don't know what was said?
	A. That's right.
	Q. Okay. He might have been talking to his bishop about his tennis game, right?
	A. I don't know what he said.

* * * * * * * * * *

The Court: [T]he purpose of the communication was ecclesiastical rather than simply friendship or leadership in the community or something of the equivalent.

Mr. McConkie: That is true.
Transcript, p. 14, l. 10-13.

Mr. Anderson: On page 14, line ten of that transcript Magistrate Boyce stated that "the purpose of the communication," and again he's referring to Mr. Hammock's communication with his bishop, "was ecclesiastical rather than simply friendship or leadership in the community or something of the equivalent?" And you responded, "That is true."

* * *

But the fact is, you don't know what the purpose of the communication was; isn't that right?

Mr. McConkie: I say, that is true.

* * *

Q. Did you know the purpose that either Mr. Hammock or the bishop had in communicating with each other on any of those instances?

A. I did not.
McConkie Depo., p. 35, l. 3-14; p. 38, l. 104.

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